No. 44847-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony Brentin,

Appellant.

Cowlitz County Superior Court Cause No. 12-1-00005-8

The Honorable Judge Michael H. Evans

Appellant's Reply Brief

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ARGUMENT

I. THE STATE DID NOT PROVE THE ELEMENTS OF FIRST-DEGREE THEFT.

The prosecution charged Mr. Brentin with theft of more than $5000 "by color or aid of deception." CP 1; RCW 9A.56.020(1)(b). Nothing in the record shows that he deceived Faveluke, or that he received more than $5000.[1] *See* Appellant's Opening Brief, pp. 12-15. The state failed to prove the elements of first-degree theft; accordingly, the conviction must be reversed and the charge dismissed with prejudice. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

Without any citations to the record, Respondent outlines "facts" allegedly supporting the verdict. Brief of Respondent, pp. 36-38. Appellate courts "are not required to search the record to locate relevant evidence." *Donlin v. Murphy*, 174 Wn. App. 288, 297 n. 15, 300 P.3d 424 (2013) (citing RAP 10.3(a)(6)). The court need not review argument unsupported by citations to the record. *State v. Brousseau*, 172 Wn.2d 331, 353, 259 P.3d 209 (2011). The court should not review Respondent's arguments in this case. *Id.*

[1] Faveluke may have discussed campaign signs with him, but did not receive a promise that he would spend any contributions on campaign signs. RP 591.

II. DETECTIVE PLAZA'S WRITTEN VERSION OF FAVELUKE'S OUT-OF-COURT STATEMENT SHOULD NOT HAVE BEEN ADMITTED UNDER ER 803(A)(5).

A party may introduce a recorded recollection as substantive evidence, but only if it concerns "a matter about which a witness once had knowledge but now has *insufficient recollection* to enable the witness to testify fully and accurately." ER 803(a)(5) (emphasis added). Here, Faveluke denied having "insufficient recollection" of the event. Instead, she testified that that she remembered the incident more clearly at the time of trial than at the time she gave her statement. RP 196. Circumstantial evidence supported this testimony. RP 563, 634, 641.

Under these circumstances, the court should have excluded the statement. ER 803(a)(5). Without citation to authority, Respondent implies that the proponent may establish the "insufficient recollection" requirement through evidence extrinsic to the declarant's own testimony. Brief of Respondent, pp. 39-40.[2] Where no authority is cited, counsel is presumed to have found none after diligent search. *In re Griffin*, 42012-1-

[2] Respondent does cite authority addressing another requirement under ER 803(a)(5). Brief of Respondent, pp. 39-40 (addressing the accuracy of the recorded recollection). But the requirement that the record "reflect [the] knowledge correctly" is different from the "insufficient recollection" requirement. As Respondent acknowledges, only the latter is at issue. Brief of Respondent, p. 40. The cited authority does not bear directly on this argument, and Respondent does not suggest that it should be extended to the "insufficient recollection" requirement. Brief of Respondent, pp. 39-40. Untethering the "insufficient recollection" requirement from the declarant's own statements would open the door to the admission of any prior statement, based solely on the judge's assessment of the witness's

II, 2014 WL 1846995 (Wash. Ct. App. May 6, 2014). This "failure to cite authority constitutes a concession that the argument lacks merit." *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (citing *State v. McNeair*, 88 Wn. App. 331, 340, 944 P.2d 1099 (1997)).

The issue raised by Respondent's argument – whether or not the court may use extrinsic evidence to evaluate the "insufficient recollection" element – is a legal issue. Courts review legal issues *de novo. State v. Jordan*, 85410-6, 2014 WL 1941970 (Wash. May 15, 2014).

This court should not adopt a rule allowing the "insufficient recollection" element to be established by extrinsic evidence. Although courts may allow extrinsic evidence to establish ER 803(a)(5)'s "reflect that knowledge correctly" element,[3] there are sound reasons for a different approach regarding the "insufficient recollection" element. A rule allowing extrinsic evidence for the latter element would require trial judges to weigh testimony and determine whether inconsistencies related to witness memory or to attempts at evasion.

Adopting such a rule here would permit admission of any recorded hearsay statement, even when the witness claims sufficient recollection of

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ability to remember matters occurring outside the courtroom. ER 803(a)(5) does not contemplate this result.

[3]*See State v. Nava*, 177 Wn. App. 272, 311 P.3d 83 (2013) *review denied,* 179 Wn.2d 1019, 318 P.3d 279 (2014); *State v. Alvarado*, 89 Wn. App. 543, 949 P.2d 831 (1998).

the events described. When combined with the *Alvarado/Nava* rule, a new rule allowing extrinsic proof of "insufficient recollection" would eviscerate ER 802, and render ER 803(a)(5) meaningless.

Furthermore, the record does not suggest the court found Faveluke lacked sufficient recollection of her interactions with Mr. Brentin. The court repeatedly stated that its primary concern was allowing the jury to consider all the evidence bearing on Faveluke's memory. RP 585-586. The court found it plausible that her memory at the time of trial was better than her memory at the time she made her statement. RP 585. The court also found that she did not remember making the prior statement, and that viewing the prior statement did not refresh her recollection. RP 586. But her inability to remember making the prior statement did not establish "insufficient recollection" of the matters covered by the prior statement.

There is a reasonable probability that the court's error materially affected the outcome of trial. *See* Appellant's Opening Brief, pp. 15-18. Respondent does not argue that the error was harmless. This failure to argue the issue may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009). Accordingly, the conviction must be reversed and the case remanded for a new trial. *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

III. THE COURT VIOLATED MR. BRENTIN'S RIGHT TO A SPEEDY TRIAL.

The trial court granted multiple continuances past speedy trial over Mr. Brentin's objections. RP 10, 16, 18; RP (1/3/13) 1-10. Respondent does not dispute this. Brief of Respondent, pp. 43-45. Instead, Respondent claims (a) that Mr. Brentin waived any error (by failing to put his objection in writing), and (b) that the continuances were proper. Brief of Respondent, pp. 43-45 (citing CrR 3.3(d)(3) and CrR 3.3(f)(2). Both contentions are incorrect.

Contrary to Respondent's assertions, CrR 3.3(d) does not require a written objection. *See* Brief of Respondent, pp. 43-44 (citing *State v. Chavez-Romero*, 170 Wn. App. 568, 285 P.3d 195 (2012) *review denied,* 176 Wn.2d 1023, 299 P.3d 1171 (2013)) Instead, a party need only "move that the court set a trial within [speedy trial] limits," and ensure that the motion is "promptly noted for hearing… in accordance with local procedures." CrR 3.3(d)(3).[4]

[4] In *Chavez-Romero,* the defendant made both an oral and a written objection. Because of this, any pronouncements regarding the need for a written objection are *dicta. Chavez-Romero,* 170 Wn. App. at 581 (citing *State v. Farnsworth*, 133 Wn. App. 1, 13 n.5, 130 P.3d 389 (2006) *review granted, cause remanded on other grounds,* 159 Wn.2d 1004, 151 P.3d 976 (2007)). The *Farnsworth* case, also cited by Respondent, does not even mention written objections. The *Farnsworth* court noted only that "for more than 20 years, defendants have carried the burden to object within 10 days of notice…" *Farnsworth,* 133 Wn. App. at 13 n. 5.

In this case, Mr. Brentin's objected to each continuance. RP 1-6, 10, 16, 18; RP (1/13/13)[5] 1-10. His objections put the court on notice that continuing the trial date would violate his right to speedy trial. *Cf. Chavez-Romero*, 170 Wn. App. at 582. The objections were made "within 10 days after the notice [was] given," and were "promptly" heard by the court. CrR 3.3(d)(3). Forcing Mr. Brentin to file an additional written motion or to schedule another hearing would have served no purpose.

Nor can the violation be sustained on the theory that court properly continued the case past the expiration of speedy trial. A court may not continue a case past speedy trial absent proof that the prosecution has properly subpoenaed the witness whose absence necessitates the continuance. *City of Seattle v. Clewis*, 159 Wn. App. 842, 847, 247 P.3d 449 (2011); *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989); *State v. Adamski*, 111 Wn.2d 574, 577, 761 P.2d 621 (1988). Nor may a case be postponed to accommodate an unavailable witness absent some showing that the witness will become available within a reasonable time. *State v. Hale*, 146 Wn. App. 299, 309, 189 P.3d 829 (2008).

Nothing in the record shows that the state properly subpoenaed the missing witness. RP 6, 8, 12; RP (1/3/13) 1. Respondent's failure to

[5] The only portion of the transcript that is not sequentially numbered is from the hearing held on January 3, 2013. This hearing is cited with the date.

argue this issue may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n.4.

Nor did the prosecution provide the trial court information suggesting the witness would "'become available within a reasonable time.'" *Hale*, 146 Wn. App. at 309 (citation omitted). Instead of addressing this deficiency, Respondent asserts that the missing witness "*became* available within a reasonable time." Brief of Respondent, p. 45 (emphasis added). But Respondent fails to cite any authority suggesting that a continuance can be upheld *post hoc* on the basis of facts not presented to the trial court. This "failure to cite authority constitutes a concession that the argument lacks merit." *Lodis*, 172 Wn. App. at 862 (citing *McNeair*, 88 Wn. App. at 340).

The trial court violated Mr. Brentin's speedy trial right. His conviction must be reversed and the case dismissed with prejudice. CrR 3.3(h); *Adamski*, 111 Wn.2d at 583.

IV. THE ACCOMPLICE LIABILITY STATUTE VIOLATES THE FIRST AMENDMENT BY CRIMINALIZING PROTECTED SPEECH; *COLEMAN*, *FERGUSON*, AND *HOLCOMB* WERE WRONGLY DECIDED.

Speech advocating criminal activity may only be punished if it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 23 L.Ed.2d 430, 89 S.Ct. 1827 (1969). This standard requires proof of

intent; knowledge is insufficient. *See, e.g., United States v. Freeman*, 761 F.2d 549, 552 (9th Cir. 1985). In other words, it is lawful to "aid" another through speech uttered with knowledge that it will further a specific crime. *Brandenburg*, 395 U.S. at 447. The state cannot criminalize mere advocacy. *Hess v. Indiana*, 414 U.S. 105, 108, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

The First Amendment protects speech advocating the commission of a crime unless the state also proves that it is (1) made with intent to incite or produce "imminent lawless action" and (2) "likely to incite or produce such action." *Brandenburg,* 395 U.S. at 447. The Washington accomplice liability statute is unconstitutionally overbroad because it requires neither. RCW 9A.08.020. It criminalizes aid (in the form of speech) made with knowledge that it will further a specific crime. *State v. Coleman*, 155 Wn. App. 951, 961, 231 P.3d 212 (2010) *review denied*, 170 Wn.2d 1016, 245 P.3d 772 (2011)).

Respondent relies primarily on *Coleman* to argue that the accomplice liability statute does not reach protected speech. Brief of Respondent, pp. 46-48. But the *Coleman* decision highlights the problem. The *Coleman* court correctly notes that accomplice liability attaches when a person "aid[s] or agree[s] to aid the commission of a specific crime with

knowledge the aid will further the crime." *Coleman*, 155 Wn. App. at 960-61.

This formulation violates *Brandenburg*. First, nothing in the statute or WPIC 10.51 defines "aid"—which encompasses pure speech—to include an intent requirement.[6] Second, mere *knowledge* does not prove *intent* to further a crime. *See* RCW 9A.08.010. Third, "a specific crime" is not the same as *imminent* lawless action. *Coleman's* summary establishes that RCW 9A.08.020 violates the First Amendment.[7]

The *Ferguson* court adopted the reasoning of *Coleman* whole cloth, but took the error a step further by quoting the *Brandenburg* standard and baldly stating that RCW 9A.08.020 meets the standard. *State v. Ferguson*, 164 Wn. App. 370, 376, 264 P.3d 575 (2011). By its plain language, the accomplice liability standard does *not* require proof of intent to produce "imminent lawless action" or that it is likely to produce such action. RCW 9A.08.020. The bare claim that the standard is met does not change the language of the statute.

Division III has relied on *Ferguson* and *Coleman* to reject a First Amendment challenge to the accomplice liability statute. *State v.*

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[6] The *Coleman* court characterizes the phrase "to aid or agree to aid" as a *mens rea* requirement. *Coleman,* 155 Wn. App. 961. An *agreement* to aid suggests intent; however, "aid" itself is defined to include "words" without any attached mental state. WPIC 10.51.

[7] An appellate court could construe the statute in a constitutional manner. However, no published opinion has yet done so.

Holcomb, --- Wn. App. ---, 321 P.3d 1288 (April 10, 2014). The *Holcomb* court makes the same mistake as *Ferguson* and *Coleman* by holding that the statute does not reach protected speech – despite the omission of an intent element -- because it requires knowledge of the crime and that the speech be "directed to inciting or producing imminent lawless action." *Holcomb*, 321 P.3d at 1291. As noted, this is incorrect – mere knowledge is insufficient, and neither the statute nor the instruction the jury received includes an imminence requirement. Like *Ferguson* and *Coleman*, the *Holcomb* court ignores the plain language of the statute and associated instruction. Neither requires that speech be directed at and likely to produce imminent lawless action for conviction. RCW 9A.08.020.

Ferguson, Coleman, and *Holcomb* are wrongly decided. They conflict with the U.S. Supreme Court's decision in *Brandenburg.*

The jury in Mr. Brentin's case was instructed that it could find him guilty as an accomplice if he aided another person "with the *knowledge* that it would promote or facilitate the commission of the crime." The word "aid" was defined to include "words." The instruction did not inform the jury that it had to find that Mr. Brentin spoke with the *intent* to facilitate the crime or that his words were likely to produce imminent lawless action. CP 60.

The accomplice liability statute and the instructions permitted the jury to convict Mr. Brentin for protected speech alone. His conviction must be reversed. *Brandenburg*, 395 U.S. at 447.

V. MR. BRENTIN ADOPTS AND INCORPORATES ANY ADDITIONAL ARGUMENTS MADE BY MS. BRENTIN.

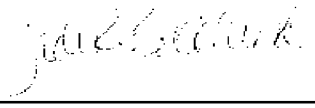
Pursuant to RAP 10.1, Mr. Brentin adopts and incorporates any additional arguments made by Ms. Brentin, should she file a Reply Brief.

CONCLUSION

Mr. Brentin's conviction must be reversed and the charge dismissed. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on June 3, 2014,

BACKLUND AND MISTRY



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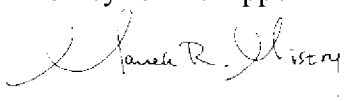

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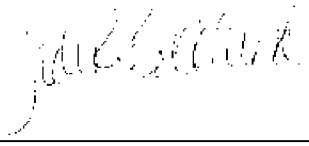
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 3, 2014.



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